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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COVAD COMMUNICATIONS CO., *et al.*,
Petitioners,

v.

BELLSOUTH CORP., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does section 252(e)(6) of the Communications Act, 47 U.S.C. § 252(e)(6), divest the district courts of the United States of subject matter jurisdiction to hear, and must aggrieved persons bring solely to a state public service commission ("commission"), civil actions for damages and attorney's fees arising from a carrier's breach of an interconnection agreement?

2. Must a claim for damages and attorney's fees pursuant to sections 206 and 207 of the Communications Act, 47 U.S.C. §§ 206, 207, alleging a breach of the duties established by section 222 of the Act, 47 U.S.C. § 222, be brought exclusively in the first instance to a state commission?

PARTIES TO THE PROCEEDING

The parties to the proceeding below in the Eleventh Circuit were as follows:

Covad Communications Company
DIECA Communications, Inc.
BellSouth Corporation
BellSouth Telecommunications, Inc.

The following participated as *amici curiae*:

Competitive Telecommunications Association
Federal Communication Commission
Florida Competitive Carriers Association
Georgia Public Service Commission
United States Department of Justice
United States Telecom Association
Verizon Communications

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state as follows: Neither Covad Communications Company nor DIECA Communications, Inc., is a publicly-held company. Both are wholly owned by Covad Communications Group, Inc., which is a publicly-held company. No person or entity holds 10% or more of the stock of Covad Communications Group, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Covad Communications Co. and DIECA Communications, Inc. (collectively, "Covad"), respectfully petition for a writ of certiorari to review the referenced judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit (A1a-14a) is reported at 374 F.3d 1044 (2004). The Eleventh Circuit denied Petitioner's petition for rehearing on August 27, 2004 (A15a). The opinion of the Eleventh Circuit resulted from the vacation and remand on unrelated grounds of an earlier decision of that court by the Supreme Court of the United States, which was ordered on January 20, 2004 (A18a) and is reported at 124 S. Ct. 1143 (the decision does not appear in the United States Reporter).

The Eleventh Circuit initially issued an opinion in this case on August 2, 2002 (A19a), which is reported at 299 F.3d 1272. Petitioner Covad filed that appeal from an order of the United States District Court for the Northern District of Georgia, Atlanta Division (A50a), which is not reported.

JURISDICTION

The judgment of the Eleventh Circuit was entered on June 25, 2004 (A1a). On August 27, 2004, Covad's petition for rehearing was denied (A15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Communications Act of 1934 ("Communications Act" or "the Act"), as amended, are reproduced in the Appendix at A86a-101a.

STATEMENT OF THE CASE

The primary issue raised in this Petition is whether the Telecommunications Act of 1996 ("1996 Act") has divested the district courts of the United States of original jurisdiction to hear two types of claims for damages and attorney's fees: first, to hear claims arising from a breach of the terms of an existing interconnection agreement incorporating duties set forth in section 251 of the Act, 47 U.S.C. § 251, negotiated pursuant to the terms of section 252 of the Act, 47 U.S.C. § 252; and second, to hear claims arising from a carrier's violation of the confidentiality provision of section 222(b) of the Act, 47 U.S.C. § 222(b).

1. Regulatory Background

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), was intended to foster competition in monopoly markets for local telephone service. *See Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 643 (2002) ("*Verizon Maryland II*").

Covad is a facilities-based competitive local exchange carrier ("CLEC") that provides digital subscriber line ("DSL") services. DSL services utilize the high frequency portion of telephone lines to make available broadband Internet access. Covad is the sole surviving national competitor to incumbent local exchange carrier ("ILEC") DSL providers such as BellSouth. In order to provide its DSL service to customers, Covad (like any CLEC) must enter into agreements to interconnect—or physically connect the wires of—its DSL transmission facilities with the monopoly "last mile" telephone lines and other facilities of ILECs such as BellSouth. The Act imposes obligations on ILECs to "interconnect" their telephone systems with CLECs on reasonable and non-discriminatory terms. 47 U.S.C. §§ 251 and 252. Additionally, Covad must share information about its customers with the ILEC in order to obtain the ILEC facilities Covad needs. The Act requires ILECs to protect the confidentiality of this information and prohibits ILECs from using this information to market services to Covad's customers. 47 U.S.C. § 222.

a. Complaints For Damages And Attorney's Fees Under The Act

Section 206 of the Communications Act, 47 U.S.C. § 206, states that a carrier will be liable for "the full amount of damages" caused by its violation of the Act, together with a reasonable attorney's fee fixed by the court. Section 207 of the Act, 47 U.S.C. § 207, states that a person claiming to be damaged by any common carrier subject to the provisions of the Act may bring a suit for damages in any district court of the United States of competent jurisdiction or before the Federal Communications Commission ("FCC"). *See AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904-905 (9th Cir. 2002) (discussing availability of damages under sections 206 and 207). The ability to bring an action for damages was intended by Congress as an important means of enforcing the

goals of the Communications Act. *See, e.g., CoreComm Communications, Inc., et al. v. SBC Communications, Inc., et al*, 18 FCC Rcd 7568, 7573-74 (2003), *reconsideration denied*, 19 FCC Rcd 8447 (2004), *review pending sub nom. SBC Communications, Inc. v. FCC*, No. 03-1147 (D.C. Cir. 2004) (discussing Congress' intent and the manner in which section 206 enforcement "furthers the purposes of the Act").

b. Interconnection Agreements

The Communications Act requires BellSouth to "interconnect" its telephone systems with the systems of competitors such as Covad upon reasonable and non-discriminatory terms. 47 U.S.C. §§ 251 and 252. To this end, Covad and BellSouth negotiated the terms upon which such interconnection shall occur and memorialized those terms in a contract commonly known as an "interconnection agreement." The interconnection agreement negotiated between Covad and BellSouth, although a private contract, is also a creature of federal statute. *See International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963) (holding that contracts mandated and governed by statute were "creations of federal law and bound to the statute and its policy."). *See also Verizon Md. Inc. v. Global Naps, Inc.*, 377 F.3d 355, 363 (4th Cir. 2004) ("An interconnection agreement is likewise a creation of federal law, specifically, the 1996 Act.") (internal quotations omitted) ("*Verizon Maryland III*"). The interconnection agreement at issue in this case was negotiated by Covad and BellSouth in 1998. Nothing in that agreement requires the parties to resolve disputes arising from the agreement before a state commission.

Pursuant to section 252(e) of the Act, 47 U.S.C. §252(e), parties to an interconnection agreement are required to file the agreement with the relevant state commission, and those

commissions are granted authority to approve or deny approval of each interconnection agreement. Section 252(e)(6) of the 1996 Act, 47 U.S.C. § 252(e)(6), provides that "[i]n any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in the appropriate federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." Section 252(e)(6), however, does not address whether state commissions have any power to adjudicate actions alleging the breach of those agreements.

Covad argues herein that section 252's grant of authority to state commissions to approve or disapprove interconnection agreements does not confer upon them *sub silencio* exclusive original jurisdiction to hear contract claims for damages when those agreements are breached, and that district court jurisdiction over interconnection disputes is not limited to review of state commission determinations. Persons damaged by the breach of an interconnection agreement may bring an action in district court, and the district courts have jurisdiction pursuant to sections 206 and 207 of the Communications Act of 1934, 47 U.S.C. §§ 206 and 207, and 28 U.S.C. § 1331, none of which have been diminished or abrogated by, or even discussed in, section 252(e)(6). *See* 1996 Act, Pub. Law No. 104-104, 110 Stat. 143, §§ 601(b)(1), (c)(1) (1996) ("[t]his Act . . . shall not be construed to modify, impair, or supersede federal [law] unless expressly so provided"). *See also Verizon Maryland II*, 535 U.S. at 644 ("[s]ection 252 does not establish a distinctive review mechanism for the commission actions that it covers (the mechanism is the same as section 1331: district-court review), and it does not distinctively limit the substantive relief available."). This is the crux of Covad's argument with respect to the First Question Presented.

c. Confidentiality Of Carrier Information

Section 222(b) of the 1996 Act, 47 U.S.C. § 222(b), provides that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."

Section 222(b) was designed to allow CLECs, such as Covad, to enter into interconnection agreements (among other things) with an ILEC without fear that the ILEC would turn around and use the information it gained from the transaction to target its marketing at the customers served by the competitor. H.R. Conf. Rep. No. 104-458, at 205 (1996) ("the new section 222 strives to balance both competitive and consumer privacy interests with respect to [protected confidential information]"). *See also Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 14 FCC Rcd 14409, 14450 (1999) ("*CPNI Order*") (discussing section 222(b) and stating that "Congress' goals of promoting competition and preserving customer privacy are furthered by protecting competitively-sensitive information of other carriers, including resellers and information service providers, from network providers that gain access to such information through their provision of wholesale services.").

Covad contends that sections 206 and 207 of the Act grant to carriers damaged by the misuse of their confidential information in contravention of section 222(b) a private right of action in the district courts, over which the district courts possess jurisdiction under 28 U.S.C. § 1331, and nothing in the Act requires such claims to be brought exclusively to state commissions in the first instance. This is the crux of Covad's argument with respect to the Second Question Presented.

2. Procedural History Of This Case

In December 2000, Covad filed a complaint in the United States District Court for the Northern District of Georgia, Atlanta Division, alleging antitrust and other causes of action. Among those were a cause of action for damages arising from BellSouth's breach of the interconnection agreement with Covad and a cause of action for damages arising from BellSouth's misuse of Covad's confidential information in violations of 47 U.S.C. § 222. Petitioner stated in the complaint that jurisdiction was proper in the district court under 28 U.S.C. § 1331 due to the federal questions involved and upon other bases for claims not at issue here.

The district court dismissed both of these claims on BellSouth's Fed. R. Civ. P. 12(b)(1) motion, holding that section 252(e) strips the district courts of the United States of original jurisdiction over any claims that "directly implicate the regulatory scheme of the 1996 Act," other than the power to review a determination on those issues by a state commission. *See Covad Communications Co., et al. v. BellSouth Corp., et al.*, 299 F.3d 1272, 1279 (11th Cir. 2002) (A80a), *vacated on other grounds*, 124 S. Ct. 1272 (2004) (A19a). Instead, the district court held that all such claims must be brought before state commissions in the first instance.

On appeal, the Eleventh Circuit initially reversed the district court's ruling with respect to both Petitioner's section 222 and 252 claims on the basis that "state commissions . . . are not authorized under section 252 to interpret interconnection agreements at all." 299 F.3d at 1291 (internal quotations omitted) (A48a). The court based its decision on its earlier ruling in *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs. Inc.*, 278 F.3d 1223, 1237 (11th Cir. 2002) ("*MCIMetro I*"), in which a panel of the Eleventh Circuit held that state commissions lacked jurisdiction to enforce interconnection agreements.

Subsequent to its initial decision in the case under review, the Eleventh Circuit reconsidered *en banc* its decision in *MCIMetro I*. On reconsideration, the full court reversed its earlier panel decision and held instead that state commissions have implicit jurisdiction in the first instance to hear disputes arising from interconnection agreements, subject to review by the district courts. *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs. Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) ("*MCI Metro II*") ("the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts."). Ignoring the normal rule that repeals by implication of jurisdictional statutes are disfavored,[1] the court furthermore held that Congress, while never expressly indicating that state commissions *had* jurisdiction *ever* to interpret interconnection agreements, in fact meant not only to permit them to do so, but also to make that jurisdiction *exclusive* in the first instance.

Meanwhile, BellSouth petitioned this Court for a writ of certiorari to review the antitrust claims in Covad's case. *See Covad Communications Co., et al. v. BellSouth Corp., et al.*, 299 F.3d 1272 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 1107 (U.S. March 20, 2003) (No. 02-1423). This Court granted BellSouth's petition and vacated and remanded the Eleventh Circuit's decision without comment for reconsideration in light of this Court's decision in *Verizon*

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[1] *See, e.g., McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-72 (1986)). A majority of the nine judges in *MCI Metro II* (two in dissent and three in concurrence) did not reach the question of whether the jurisdictional provision of 47 U.S.C. § 252(e)(6) would even apply to actions by PUCs interpreting interconnection agreements.

Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398 (2004) ("*Trinko*"). *See Bell-South Corp., et al. v. Covad Communications Co., et al.*, 124 S. Ct. 1143 (2004). *Trinko* did not address the jurisdictional issues presented herein.

In June 2004, after this Court's remand, the Eleventh Circuit affirmed the dismissal of Covad's breach of contract and section 222 claims. *Covad Communications Co., et al. v. BellSouth Corp., et al.*, 374 F.3d 1044, 1052-53 (11th Cir. 2004) (A14a). Without discussion, the Eleventh Circuit expanded its holding in *MCIMetro II* to cover not only disputes arising from interconnection agreements negotiated under section 252, but also claims arising from a violation of the wholly unrelated confidentiality provisions of section 222. *Id.* Indeed, the Eleventh Circuit has divested federal courts (and the FCC by implication) of authority to hear claims arising from violations of the 1996 Act and, by consigning such claims to state commissions that often lack authority to award damages, has eviscerated carriers' ability to obtain damages for violations of the Act.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's holding in this case with respect to sections 252 and 222 is contrary to Congress' intention as clearly established under both the Communications Act of 1934 (as amended by the 1996 Act) and 28 U.S.C. § 1331, thereby raising a serious issue of interpretation of federal law and creating a split among the circuits on both of the Questions Presented. Moreover, its holding is flatly inconsistent with the analysis of the expert agency charged with interpretation and enforcement of the Act, the FCC. *See, e.g., CoreComm Communications, Inc., et al. v. SBC Communications, Inc., et al*, 18 FCC Rcd 7568, 7574-75 (2003) (rejecting claim that section 252 overrides the broad language of the Act's damages complaint provisions, which

include sections 206-209), *reconsideration denied*, 19 FCC Rcd 8447 (2004), *review pending sub nom. SBC Communications, Inc. v. FCC*, No. 03-1147 (D.C. Cir. 2004); *see also Core Communications, Inc. v. Verizon Maryland, Inc.*, 18 FCC Rcd 7962, 7971 (2003) (FCC has jurisdiction to hear damages complaint under sections 206 and 208 for violation the interconnection obligations of section 251(c)(2) arising from breach of interconnection agreement) (citing *Core-Comm*, 18 FCC Rcd at 7573).

Furthermore, the Eleventh Circuit's decision has negated the right to seek damages and attorney's fees in federal court, and potentially before the FCC, under sections 206 and 207 for the breach of an interconnection agreement or violation of section 222 of the Act. The state commissions, designated by the Eleventh Circuit as having exclusive original jurisdiction to hear disputes that touch upon or relate to the 1996 Act, often do not have the ability, as the federal courts and the FCC do, to provide the damages remedies expressly created by the Act made enforceable through actions in federal courts or the FCC. Unlike those forums, state commissions generally have very limited remedial powers. *See, e.g., In re Petition of AT&T Communications of the Southern States, et al. for Structural Separation of BellSouth Telecommunications, Inc.*, Fla. Public Service Comm'n Docket No. 010345-TP, 213 P.U.R. 4th 383, at p.6 (2001) (finding that "we only have those powers expressly granted by statute or necessarily implied" and that "we have neither federal nor state authority to grant the relief requested."). In particular, state commissions normally lack the ability to award damages or attorney's fees. *See, e.g., Taffet v. Southern Co.*, 930 F.2d 847, 853 (11th Cir. 1991), *vacated on other grounds*, 958 F.2d 1514 (11th Cir. 1992) ("[t]hough the [state commissions] can set rates prospectively, they cannot set rates retroactively or award damages."); *Winter Springs Development Corp. v. Florida Power Commission*, 402 So. 2d 1225, 1228 (Fla. Dist. Ct. App. 1981) ("the Public Service Commission is

not authorized to award money damages"); *Georgia Public Service Comm'n v. Atlanta Gas Light Co.*, 55 S.E.2d 618, 630 (Ga. 1949) ("We find nothing in the powers given to the Public Service Commission that would authorize it to grant reparations or compensatory damages").

I. THE DISTRICT COURTS OF THE UNITED STATES HAVE NOT BEEN STRIPPED OF SUBJECT MATTER JURISDICTION TO HEAR ACTIONS FOR DAMAGES AND ATTORNEY'S FEES ARISING FROM THE BREACH OF AN INTERCONNECTION AGREEMENT

Covad's complaint included a claim for damages arising from BellSouth's breach of the interconnection agreement negotiated between Covad in BellSouth in 1998. The district court dismissed Covad's claim on BellSouth's Fed. R. Civ. P. 12(b)(1) motion, holding that disputes arising from the rights and duties found in an interconnection agreement can only be brought to a state commission, and that the role of the district court is simply and exclusively to review a state commission's initial decision on the matter. (A79a-80a). After initially reversing the district court's ruling, the Eleventh Circuit (on remand from this Court for other reasons) upheld the district court's dismissal of Covad's breach of contract claims, extending the reasoning of its recent decision in *MCIMetro II*. 374 F.3d at 1053-54 (A13a-14a). This decision, extending *MCIMetro II* so as to divest all jurisdiction but that of the state commissions to hear disputes under the 1996 Act in the first instance, was incorrect and creates a conflict between the circuits.

1. The Eleventh Circuit's holding that section 252(e)(6) abrogates the district court's jurisdiction to hear Covad's breach of interconnection agreement claims conflicts with this Court's reasoning in *Verizon Maryland*. The Eleventh Circuit held in the case under review that section 252(e)(6) of

the Act, 47 U.S.C. § 252(e)(6), divests the district court of jurisdiction over claims that touch upon or relate to the 1996 Act, including the breach of an interconnection agreement entered into pursuant to the Act. 374 F.3d at 1053-54 (A13a-14a). As a result, Covad must bring its breach of interconnection agreement claims before the relevant state commissions in the first instance. (A14a). This holding is plainly wrong.

Nothing in the language or purpose of section 252(e)(6) divests the district courts of jurisdiction. *See Verizon Maryland II,* 535 U.S. at 642. Even assuming that section 252(e)(6) may be fairly read to imply that state commissions can interpret interconnection agreements, *id.* at 641-44, that is only an implication. There is nothing in that provision that explicitly gives state commissions jurisdiction, much less exclusive jurisdiction in the first instance, that abrogates the power of both the federal courts and the FCC. *See id.* at 643 ("[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.") (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)). This Court has clearly indicated that "where otherwise applicable jurisdiction was meant to be excluded [in the Act], it was excluded expressly." *Id.* at 644. This is plainly incompatible with the reasoning of the Eleventh Circuit, and leads to an entirely different result.

2. The Eleventh Circuit's holding in the case under review also directly conflicts with the result reached by the Fourth Circuit on remand in *Verizon Maryland III*, 377 F.3d at 363. In that case, a dispute arose between Verizon (then called Bell Atlantic Maryland, Inc.) and MFS Intelenet of Maryland, Inc. over payments for local traffic in their interconnection agreement, and the parties took the matter to the Maryland commission. *Id.* at 359-60. The Maryland commission ordered Verizon to pay reciprocal compensation to competing local carriers for delivering ISP-bound traffic,

and Verizon appealed the decision in the United States District Court for the District of Maryland. *Id.* at 360-61. The district court dismissed the action, and the Fourth Circuit affirmed on the ground that neither 47 U.S.C. § 252(e)(6) nor 28 U.S.C. § 1331 provided a basis for federal jurisdiction. *Id.* at 361 (citing *Bell Atlantic Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001) ("*Verizon Maryland I*")).

This Court vacated and remanded the Fourth Circuit's decision. *Verizon Maryland II*, 535 U.S. at 647. In *Verizon Maryland III*, the Fourth Circuit held that *nothing* in section 252(e)(6) divests the district courts of jurisdiction to hear a claim involving the interpretation of an interconnection agreement or vests the state commissions with exclusive original jurisdiction over such disputes. 377 F.3d at 363. Nothing in the Fourth Circuit's decision suggests the total abrogation of federal jurisdiction or the vesting of exclusive original jurisdiction in the state commissions commended by the Eleventh Circuit.

Thus, in the Eleventh Circuit there is absolutely no jurisdiction under which a district court can hear Covad's claims if they relate to or touch upon the 1996 Act, whereas in the Fourth Circuit there is no such bar, and the different results are reached as a result of interpreting the same section of the Act. Covad now faces a situation where, in the portion of its service area falling within the Fourth Circuit, it is able to take its damages claims directly to the district court for resolution, while in the portion of its service area falling within the Eleventh Circuit, Covad must instead take its claims to the commissions of Alabama, Florida, and Georgia—none of which are empowered to award damages or attorney's fees.

3. The FCC itself has addressed the issue of federal court jurisdiction to hear damages claims relating to the local competition provisions established in the 1996 Act, and its conclusion is directly at odds with the Eleventh Circuit. In *CoreComm Communications, Inc., et al. v. SBC Communi-*

cations, Inc., et al, 18 FCC Rcd 7568, 7573-74 (2003), *reconsideration denied*, 19 FCC Rcd 8447 (2004), *review pending sub nom. SBC Communications, Inc. v. FCC*, No. 03-1147 (D.C. Cir. 2004), the FCC found that it had jurisdiction under sections 206 and 208 to adjudicate a Section 251(c) claim under the language, structure, and purpose of the 1996 Act. *See also Core Communications, Inc. v. Verizon Maryland, Inc.*, 18 FCC Rcd 7962, 7971 ¶ 22 (2003) (finding jurisdiction to adjudicate alleged violation of section 251(c)(2) duty to provide interconnection consistent with terms of interconnection agreement).

The FCC's interpretation flatly contradicts the Eleventh Circuit's holding that section 252(e) supercedes the Communication Act's damages provisions. Relying on this Court's reasoning in *Iowa Utilities Board v. FCC*, 525 U.S. 366, 377-78 (1999), the FCC concluded that "since Congress inserted the local competition provisions into the existing statute, the complaint provisions of that statute extend to the local competition provisions." *CoreComm*, 18 FCC Rcd at 7575. According to the FCC:

> in order for [section 251 or 252 of] the 1996 Act to supersede the Commission's broad general complaint authority [under section 206], it would have to do so explicitly. There is, however, no explicit language in sections 251 or 252, or elsewhere in the Act, depriving the Commission of jurisdiction to hear complaints [over interconnection agreements].

CoreComm, 18 FCC Rcd at 7574. The FCC's *CoreComm* analysis is in unison with this Court's statements in *Verizon Maryland II* that "where otherwise applicable jurisdiction was meant to be excluded in [the Communications Act], it was excluded expressly" and that "§ 252(e)(6)'s silence on the subject leaves the jurisdictional grant of § 1331 untouched." 535 U.S. at 644. The Eleventh Circuit's holding in this case stands in contradiction to the analysis of this Court, the Fourth Circuit, and the FCC.

* * * *

Section 252(e)(6) of the Communications Act, 47 U.S.C. § 252(e)(6), does not divest the district courts of the United States of subject matter jurisdiction to hear civil actions for damages and attorneys' fees arising from a carrier's breach of an interconnection agreement. The Eleventh Circuit's ruling on this question stands in marked contrast with the rulings of this Court, the Fourth Circuit, and the FCC. A ruling from this Court on the jurisdictional question would clarify whether the federal courts are limited to a purely "quasi-appellate" role in reviewing claims for damages and attorney's fees as a result of breached interconnection agreements. Such a ruling would also resolve the question concerning the availability of damages and attorney's fees for these claims, since they are not provided for in the state forums as required by the Act. In the absence of a ruling from this Court, the Eleventh Circuit has created a jurisdictional loophole affecting scores of important cases.

II. THE DISTRICT COURTS OF THE UNITED STATES HAVE SUBJECT MATTER JURISDICTION TO HEAR ACTIONS FOR DAMAGES AND ATTORNEY'S FEES ARISING FROM VIOLATIONS OF THE EXPRESS PROHIBITIONS OF 47 U.S.C. § 222

Having held that section 252(e)(6) worked to divest federal courts and the FCC of jurisdiction over breach of interconnection agreement claims, the Eleventh Circuit went on to hold that section 252(e)(6) also divested them of jurisdiction over claims arising from violations of a wholly independent provision of the Communications Act. In its Complaint, Covad included a claim for damages arising from BellSouth's violation of the statutory duties set forth in section 222 of the Act, 47 U.S.C. § 222. The district court dismissed Covad's claim on BellSouth's Fed. R. Civ. P.

12(b)(1) motion, holding that disputes such as this one touched upon or related to the 1996 Act and could therefore be brought solely to a state commission. (A80a). The court held that a district court could do no more than review a state commission's initial decision on the matter. (A80a). After initially reversing the district court's ruling, the Eleventh Circuit (on remand from this Court for other reasons) upheld the district court's dismissal of Covad's section 222 claims. 374 F.3d at 1053-54 (A13a-14a). This decision was incorrect and creates a conflict between the circuits. *See Conboy v. AT&T Corp.*, 241 F.3d 242, 248-251 (2d Cir. 2001) (discussing availability of damages under sections 206 and 207 for violations of section 222). *See also Coeur d'Alene Tribe*, 295 F.3d at 904-905 (discussing availability of damages under sections 206 and 207).

1. The Eleventh Circuit's conflation of section 222 enforcement with state commission review of interconnection agreements is erroneous. The Eleventh Circuit reads section 252(e)(6) of the 1996 Act as stripping the district courts of jurisdiction to hear actions for damages arising from violations of the confidentiality provisions of section 222. 374 F.3d at 1053-54 (A13a-14a). The court's holding on this point defies the plain language of the statute, the intent of Congress, and directly contradicts the Second Circuit's reasoning in *Conboy*, 241 F.3d at 248-51.

In its complaint, Covad alleged that BellSouth engaged in a practice of using confidential information received from Covad in their various business transactions to market its services to Covad's customers in a targeted way, thereby allowing BellSouth to effectively "undercut" Covad's sales efforts. (A53a). Covad alleged, and alleges, that this misuse of Covad's confidential information violated section 222(b)'s prohibition on the marketing use by a carrier of the information of another carrier gained through business transactions between the two.

Section 222 of the Communications Act creates specific rights and prohibitions intended to protect competitors from abusive practices by incumbent carriers. H.R. Conf. Rep. No. 104-458, at 205 (1996) ("the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI."); *CPNI Order*, 14 FCC Rcd at 14450 (discussing section 222(b) and stating that "Congress' goals of promoting competition and preserving customer privacy are furthered by protecting competitively-sensitive information of other carriers, including resellers and information service providers, from network providers that gain access to such information through their provision of wholesale services."). It was for the purpose of vindicating the rights and enforcing the prohibitions found in the Communications Act that Congress included sections 206 and 207, which establish a private right of action for violations of the Act. 47 U.S.C. §§ 206 and 207. Covad's section 222(b) claim therefore alleges a violation of an explicit prohibition for which the Communications Act provides a private right of enforcement in sections 206 and 207.

In its decision, however, the Eleventh Circuit conflated the confidentiality provisions of section 222 with the unrelated interconnection agreement provisions of section 252, and found without discussion that the only recourse for persons damaged by a carrier's misuse of their confidential information is review by a state commission. 374 F.3d at 1053-54 (A13a-14a). Even if the district courts lack original jurisdiction to hear disputes arising from interconnection agreements negotiated under section 252 (which they do not, *see* argument I, *supra*), the court's offhanded treatment of section 222 as dependent upon section 252 and, therefore, as unenforceable by a district court, is in error. Nothing in section 252 relates in any way to the prohibitions on dissemination or use of confidential information found in section 222. The Eleventh Circuit's only authority for the

ruling was its own decision in *MCIMetro II*, 317 F.3d at 1277, which did not even discuss section 222.

2. Congress established a clear right of action in district court for damages arising from violations of the prohibitions and duties set forth in the Communications Act, and there is no evidence in the language or history of the 1996 Act that Congress intended to suppress that right for violations of section 222. Therefore, as this Court has held, it is not within the courts' power to negate Congress's directive. *Miles v. Apex Marine Corp*, 498 U.S. 19, 31 (1990) ("Congress has spoken directly to the question of recoverable damages on the high seas, and 'when it does speak directly to a question, the courts are not free to supplement Congress' answer so thoroughly that the Act becomes meaningless.'").

If Congress had intended to negate sections 206 and 207 and make state commissions the exclusive venues for enforcement in the first instance of section 222 (or any other section) by its enactment of section 252(e)(6), it could have said so clearly. It did not, and the courts are therefore bound by the plain language of sections 206 and 207. *See Verizon Maryland II*, 535 U.S. at 644 ("[s]ection 252 does not establish a distinctive review mechanism for the commission actions that it covers (the mechanism is the same as § 1331: district-court review), and it does not distinctively limit the substantive relief available."); s*ee also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("we assume that Congress is aware of existing law when it passes legislation") (citing *Apex Marine Corp.*, 498 U.S. at 32); *CoreComm*, 18 FCC Rcd at 7574-75 (nothing in section 251 or 252 or elsewhere in the 1996 Act expressly supercedes section 206 of the Act or deprives the FCC of jurisdiction to hear claims involving the local competition provisions of the 1996 Act).

Indeed, the legislative history of section 222 never mentions state commission enforcement. *See, e.g.*, H.R. Rep. No.

104-204, at 47-48 (1996); H.R. Conf. Rep. No. 104-458, at 205 (1996). The Eleventh Circuit's decision thus erroneously vested in state commissions the exclusive authority to enforce a provision of the Act and stripped the district courts of jurisdiction in contradiction of the language and purpose of the statute.

3. The Eleventh Circuit's holding in this case that section 252(e)(6) of the Act somehow strips the district courts of jurisdiction to hear damages actions arising from a breach of the prohibitions found in section 222 also directly contradicts the Second Circuit's reasoning in *Conboy v. AT&T Corp.*, 241 F.3d 242, 248-251 (2d Cir. 2001). While it dismissed the claim for its failure to allege actual damages, the Second Circuit recognized in *Conboy* that a plaintiff's claim under section 222 could be brought pursuant to sections 206 and 207 in federal court. *Id.* at 251. The Second Circuit's treatment of sections 206, 207, and 222 follows the plain meaning of the statutory language and this Court's statement in *Verizon Maryland II* that "where otherwise applicable jurisdiction was meant to be excluded in [the Communications Act], it was excluded expressly." 535 U.S. at 644. It also harmonizes the FCC's unambiguous interpretation that "section 206 of the Act is 'phrased in mandatory terms: a carrier that has violated the Act shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation.'" *Communications Vending Corporation of Arizona, Inc. v. Citizens Communications Company*, 17 FCC Rcd 24201, 24217 (2002) (citing *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995)). There is no basis to conclude that anything in the 1996 Act was intended by Congress to repeal sections 206 and 207 with respect to enforcement of section 222, and the Eleventh Circuit's decision to the contrary should be reversed.

4. The Eleventh Circuit's holding in this case also diverges from the reasoning of the Ninth Circuit. In *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 901 (9th Cir. 2002), the Coeur d'Alene Tribe ("Tribe") conducted a lottery on its reservation lands and non-residents of the reservation could participate by purchasing tickets by phone over a service offered by AT&T. *Id.* at 902-03.

AT&T refused to provide the service and the Tribe filed an action with the Coeur d'Alene Tribal Court under Section 201 of the Act. *Id.* AT&T challenged the personal and subject matter jurisdiction of the Tribal Court, but the Tribal Court rejected AT&T's arguments and enjoined AT&T from refusing to provide the services. This decision was affirmed by the Tribal Court of Appeals. *Id.* AT&T then filed suit in federal district court seeking a declaration that the Tribal Court lacked jurisdiction. *Id.* The United States District Court for the District of Idaho decided the case on grounds that did not reach the jurisdictional question, and granted declaratory relief for AT&T stating that AT&T did not have to provide toll free services in the case of a state which had warned it of potential violations of law, and the Tribe appealed. *Id.*

The Ninth Circuit held that the Tribal Court lacked jurisdiction to entertain the Tribe's claim. *Id.* at 905. "By its express language, Section 207 established concurrent jurisdiction in the FCC and federal district courts only, leaving no room for adjudication in any other forum--be it state, federal, or otherwise." *Id.* The Eleventh Circuit's holding in this case directly contradicts the Ninth Circuit's holding that a cause of action for damages and attorney's fees brought under sections 206 and 207 of the Act must be asserted in federal court or before the FCC *and nowhere else.*

* * * *

A claim for damages and attorney's fees pursuant to sections 206 and 207 of the Communications Act, 47 U.S.C. §§ 206 and 207, alleging breach of the duties established by section 222 of the Act, 47 U.S.C. § 222, need not be brought exclusively in the first instance to a state commission. The Eleventh Circuit holding on this question is contrary to law and conflicts with decisions from the Second Circuit and the Ninth Circuit. A ruling from this Court on the jurisdictional question would resolve the split and clarify that the federal courts are not limited to a purely "quasi-appellate" role in reviewing claims for damages and attorney's fees for violations of the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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